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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1606

IRVING P. KARLIN,

Petitioner,

v.

WARREN E. AVIS and AVIS INDUSTRIAL CORPORATION,

Respondents.

PETITIONER'S REPLY TO RESPONDENTS' BRIEF

JOSEPH HELLER
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New York, N. Y. 10007

Counsel for Petitioner

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1972

- X

IRVING P. KARLIN

Petitioner

-against-

WARREN E. AVIS and AVIS INDUSTRIAL CORPORATION

Respondents

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PETITIONER'S REPLY TO
RESPONDENT'S BRIEF

- X

Respondents no longer maintain and have in fact abandoned the position adhered to by them and the Circuit Court of Appeals, that a finder's fee will be allowed only upon a showing of affirmative written evidence of assent to paying the fee by the person to be charged.

Instead, Respondents now claim, that based on the facts found in the Morris Cohon & Co.v.Russell case, there must be found in the agreement a showing of an intention to be obligated to pay for services rendered. (Respondent's Brief in opposition p. 11).

Respondent argues that there was such an intention to be obligated to pay in the clause in the COHON buy and sell agreement, wherein the seller agreed to indemnify the

buyer against any claim for a finder's fee. Absent a like clause in our case, says respondent, the Cohon case was no application.

We answer this position, as follows:

(1) A clause indemnifying a party against any claim does not in and of itself admit an obligation-nor is it an agreement to pay nor a recognition of employment. It does permit an inference that some form of liability was originally intended. Similar inferences, may be made, from other given states of fact. The Cohon case did not limit the conclusions it reached to a specific state of facts. It established a principle of law.

(2) What Cohon mandates is evidence of employment. Respondent construes this to mean an obligation to pay. To an extent this is true. Evidence of employment results in an obligation to pay on a quantum meruit basis. The positions of the petitioner and respondent can thus be reconciled.

The record and (the conceded facts) require the inevitable conclusion, (as petitioner contends), that there exists writings signed by the party to be charged, fully identifying the terms, unequivocally and clearly showing an in-

tention to be obligated.

(3) In both the Cohon case and ours, the parties rely on the agreements entered into between the buyer and seller to establish a necessary writing to meet the requirements of the Statute of Frauds. The only difference in the agreements is that in the Cohon case there is an undertaking to indemnify and in our case one of the parties (purchaser) (without the knowledge and consent of the finder) agrees to pay all of the finder's fee.

In our case the buy and sell agreement provides, that Ultra the purchaser, shall pay in full the finder's fee to Mr. Karlin upon final consummation of this transaction. This language creates the same inference of an obligation to pay in the case of a person who says "I will indemnify" (Cohon case) as it does where the language is, "I will pay in full" (our case). If the Seller had no obligation to pay in the first place why provide that the buyer should pay? or why provide that the buyer pay in full? In the context used 'full' means both Seller and buyer's obligations.

(4) In the Cohon case there was only one writing from which an inference could be

drawn. In our case we have many more. For instance respondents pleaded under oath in their answer the following affirmative defense.

"On or about January 16, 1969 defendant, Warren E. Avis and one Ultra Dynamics Corporation ("Ultra Dynamics") entered into a contract in writing (Exhibit C to the complaint), wherein and whereby said Ultra Dynamics agreed to pay any and all commissions payable to plaintiff as a finder, and in a separate contract in writing executed on or about January 16, 1969, a copy of which is annexed hereto as Exhibit A, by which plaintiff agreed to this, Ultra Dynamics agreed to pay to plaintiff, and plaintiff agreed to take from Ultra Dynamics, 9,000 shares of Ultra Dynamics stock as the entire finder's fee accruing to plaintiff on account of the transaction aforesaid, in substitution for and in discharge of whatever obligations defendants had to plaintiff therefore."

In addition, the verified answer and the sworn affidavits submitted by Avis and McNiece (treasurer of Avis Corp.) who as admitted by Avis was his authorized agent, they concede that Avis instructed McNiece to em-

ploy petitioner, who was to obtain an interested party to purchase Avis stock. They further concede that petitioner duly performed such services resulting in a sale on the very terms agreed upon at the first meetings of the parties. In the within motion for summary judgment respondent, (not in the answer or prior affidavit) Avis claimed that after the first meeting was arranged by petitioner and in the course of negotiation, Avis told his agent McNiece to advise petitioner that Avis will not pay petitioner. Petitioner denied this and swore that there was a definite understanding to pay a finder's fee on a graduated scale; in fact petitioner confirmed this by letter the day following the meeting. No written answer was ever made to this letter. Petitioner's version of the facts were not even alluded to by the courts below and respondents version was accepted as though nothing else was before the court.

The use of the statute by respondents, perverts its purpose. The statute is invoked by respondents, in a case where petitioners' employment is conceded. They use it as a sword not as a shield.

(5) We cited two Special Term cases to establish the fact that Cohon vs. Russell does not require an affirmative writing whereby the party to be charged agrees in so many words to pay or be obligated. To illustrate our point and respondents misinterpretation of the Klein vs. Smigel case we here set forth the complaint in full and the opinion of the court which embodies the writings claimed to show an intention to be obligated.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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DAVID I. KLEIN,

Plaintiff,

-against-

WALTER A. SMIGEL and CRESCENT CORSET COMPANY, INC.

Defendants

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COMPLAINT

Plaintiff for his complaint herein, by his attorney, Sol Gelb, Esq., respectfully alleges:

1. Upon information and belief that at all times hereinafter mentioned, Crescent Corset Company, Inc. was and still is a duly organized domestic corporation.

2. That during the year 1970, defendant Smigel was the principal stockholder and chief executive officer of the said Crescent Corset Company, Inc.

3. That on or about August 27, 1970, the defendant, Smigel, advised the plaintiff that he was interested in selling his company, namely, Crescent Corset Company, Inc. to a prospective buyer.

4. Plaintiff at that time advised the said Smigel that the NCC Industries, Inc. might be interested in such an acquisition and that he could arrange a meeting

between Smigel and one Sol Kittay, Chairman of the Board of NCC Industries, Inc.

5. That said Smigel then and there authorized the plaintiff to arrange such a meeting, and thereupon the plaintiff arranged with the said Kittay for the meeting between Smigel and Kittay.

6. That the said meeting took place on September 7,1970, at the office of the said NCC Industries, Inc. and plaintiff was subsequently advised by both said Kittay and Smigel that each would take the matter of such a sale, under consideration.

7. That thereafter in or about February,1971, the NCC Industries, Inc. did contract with defendants for the acquisition of said Crescent Corset Company, Inc. That the said acquisition price involved was not disclosed to the plaintiff, but upon information and belief plaintiff alleges that the price of acquisition was approximately Three Million Dollars ($3,000,000.00).

8. That the services rendered by plaintiff in bringing the said seller and buyer together are reasonably worth three percent. (3%) of the total consideration paid, or the sum of Ninety Thousand Dollars ($90,000.00).

9. Due demand has been made upon the defendants for the said reasonable value of said services, and defendants have failed and refused to pay the same.

WHEREFORE, plaintiff demands judgment against the defendants in the sum of Ninety Thousand Dollars ($90,000.00) and for costs and disbursements.

SOL GELB,
Attorney for Plaintiff,
Office & P.O. Address,
30 Broad Street,
New York, N.Y. 10004

SUPREME COURT: NEW YORK COUNTY
SPECIAL TERM : PART I

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DAVID I. KLEIN,

Plaintiff,

-against-

WALTER A. SMIGEL and
CRESCENT CORSET COMPANY, INC.,

Defendants

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OPINION

Index No.
137/1972

AMSTERDAM, J.:

Defendant moves for an order pursuant to CPLR 3211 (a) 5 dismissing the complaint on grounds that the action pleaded is barred by the statute of frauds (General Obligation Law, § 5-701 (10)). In this action plaintiff seeks to recover the reasonable value of his services which he claims to have rendered as a broker or finder in connection with the acquisition of the Crescent Corset Company, Inc. by NCC Industries, Inc. Plaintiff estimates that the reasonable value of those services to be worth 3% of the total consideration paid or some $90,000.

The law in this area is settled. General Obligation Law § 5-701- (10) requires a contract or agreement providing for the compensation of a business broker acting as a "finder", originator or introducer to be

in writing. That requirement cannot be avoided by bringing an action in quantum meruit (Minichiello v. Royal Business Funds Corp., 18 NY 2d 521). However, as in Morris Cohen & Company v. Russell, 23 NY 2d 569, plaintiff does rely upon what he alleges to be a written memorandum of their agreement. The writing relied upon in this instance is a letter dated 2/15/71 sent by defendants to plaintiff and the enclosure included therein. The following are the pertinent provisions of the letter of February 15,1971:

"In confirmation of our prior telephone conference regarding the acquisition by NCC Industries, Inc. of Crescent Corset Company, Inc. we find now that our transaction has advanced to the point where we expect a contract signing within a week. It would be helpful, as a part of our closing, if we could have from you a letter to the effect that you will assert no claim as a finder or broker in connection with the transaction.

I am enclosing,for your convenience, a proposed letter of release. If it is satisfactory, I would appreciate your signing and returning it to me at your earliest convenience. It would be most helpful if you could mail it so that we receive it by February 22, 1971."

The enclosure dated February 16,1971 stated:

"In confirmation of my telephone conference with you the other day, for value received, I hereby remise, release, and discharge you and the other shareholders of Crescent Corset Company, Inc. of and from any liability to me or to any of my associates arising from or by reason of any act, negotiations or discussions which I or we have performed or have had with you or members of your group or with NCC Industries, Inc. or with any executive or person associated with NCC Industries, Inc. in connection with the proposed acquisition by NCC Industries, Inc, of the stock or the assets of Crescent Corset Company, Inc."

The sole issue thus to be determined is whether the alleged memorandum is sufficient. Does it establish the parties to the contract, the subject matter thereof and that plaintiff performed (Morris Cohen & Company v. Russell, Supra, at p.574). The court must answer that question in the affirmative. Reasonable construction of the letter aforesaid and the proposed release, read together, mandates this result. The memorandum is sufficient to meet the requirements of the statute of frauds. This result is not in any way affected by the fact that a rate of compensation is not stated in the proposed release. If it does not appear that there has been an agreement on the rate of compensation, a sufficient memorandum need only evidence the fact of plaintiff's employment by

defendant to render the alleged services. (Morris Cohen & Company v. Russell, supra, at p. 575)

Accordingly, defendant's motion to dismiss the complaint for the reason aforesaid is denied.

Dated: March 20th, 1972

Birdie Amsterdam

J.S.C.

There is not one word in the complaint which alleges even an oral promise to pay. Like in our case the seller sought an agreement of no liability. We note that there is no admission of employment or an acknowledgment of services rendered in the Klein case.

Respondent's briefs below and here were skilfully drawn with a view of creating serious prejudice to petitioner's cause. Of counsel, for Respondent, has taken another step in that direction by making a rude accusation that petitioner's counsel has flagrantly misquoted Judge Bartels summary of the facts as presented in the petition (Respondent's Brief, page 17, last paragraph.)

Had, Of Counsel, read the petition with greater care, at the bottom of page 8 and 9, he would have found the following quote from Judge Bartels opinion:

> "The formal agreement recognized that Karlin was the finder entitled to be paid. Karlin was not paid--"
>
> "Based upon this version of the facts, KArlin claims that he

is entitled to a commission from Warren Avis----(underscoring mine)

"Since no affidavit submitted by the defendants disputes the crucial fact that a brokerage agreement was concluded--"

It is clear Judge Bartels accepted petitioner's statement of facts because they were not denied. It is axiomatic that when a claim is asserted and is not denied, the claim is established.

Respondent relies heavily on a letter agreement between petitioner and the purchaser. Although respondents are not a party to it and the purpose of the letter was to be a mere change between the buyer and the petitioner for the payment of the buyers 1/2 of the finder's fee from cash to stock, respondent gives the impression that petitioner wrote the letter and that he intended the letter a substitution and release of respondent's obligation. In fact the writing was handwritten by the buyer's attorney, was not in the form presented to this court and the court below, was fraudulently obtained and bears only upon the rights and liabilities of the buyer

Ultra and petitioner. We reproduce a photostat of the original doctored letter, as an appendix (p.22). When we compare the physical appearance of this letter (appendix (p.22) with the one appearing in respondent's brief on pages 5 and 6 it is clear, respondents have not stated the true form of the writing.

Respondent's argument that only a written agreement can satisfy the Fraud Statute is in error.

The Statute requires not a written agreement but a memorandum of the terms of the oral agreement, signed by the party to be charged.

We therefore agree with respondents contradictory argument (on page 13) respondents brief that a writing which acknowledges the existence of an oral obligation is sufficient to satisfy the statute of Frauds. We so contended below to no avail. We have both an oral and written agreement. Petitioner was defeated on the sole ground that there is no signed writing that specifically states, in so many words, "I, (Avis and Avis Industrial) agree to pay to you (Karlin) a specified commission. As we read the cases there is no such requirement.

However when a defendant pleads that its obligation was substituted or satisfied by another, he admits the existence of the obligation and or employment by the party to be charged.

Since 1953 the courts of New York citing Crabtree vs. Elizabeth Arden Sales Corp., 305 NY 48, consistently have allowed litigants to avert the Statute of Frauds with a confluence of memoranda. "The Federal Courts adopted the rule,permitting signed and unsigned writings to be read together, provided they refer to the same subject matter". "Such writings need not all be directed from promisor to promisee". Ideal Structure Corp. vs. Levine Huntville Devel. Corp. (5 Cir. 396 F (2) 817.

Thus when (1) the final contract of 1/16/69, (2) the answer of respondents,(3) the admissions contained by Avis and his agent McNiece, (4) petitioner's letter of 10/16/68 and (5) the purchasers proposal of 10/28/68 requiring respondents to pay one half of the finder's fee to petitioner, when read together confirm an obligation of respondents to pay. When we add petitioner's claim, entirely

overlooked by the appellate court, that respondents changed the 5% fee to a graduated percentage amount and agreed orally to pay it, there is a firm oral agreement documented by writings.

Barkworth vs. Young Hight Court of Chancery, 4 Drewery, 1 to 10; Young vs. Tuck, 178Sw (2) 88.

No negation of obligation appears in the buy and sell agreement of 1/16/69. Were there such a negation, ie a writing expressive of the terms yet repudiating an obligation to pay, it still would comply with the Statute of Frauds. Bailey vs. Sweeting Vol. 142 English Report page 332 (9 Common Bench N.S. page 842).

And respondent's failure to answer the letters of 10/16/68 wherein the terms of compensation are set forth, estops them from denying the obligation, Willard Heburn vs. Speivak, 180 Fed. (2) 480 (Cir); Mc Garry Brothers vs. U.S. 404 Fed (2) 478, 8 Circ. and Helenie Lines vs. Gulf Oil 340 Fed. (2) 398 (2) 398 (2) Circ.

Avis in his affidavit (4/26/71 (par.10) concedes he directed his agent,

McNiece, to act for him concerning a sale of his stock in Avis Corp. McNiece in his affidavit of 2/25/71 (par.8) states "In or about October 1968 arrangements were made between myself and Irving P. Karlin to meet Ultra in New York City to negotiate the sale of Avis stock". Therefor the finder's fee was earned on 10/15/68 and became payable on 1/16/69 when the final contract was signed.

Petitioner as a finder, and not a broker, earned the legal right to a fee after introducing the parties on 10/15/68. It became vested when the 1/16/69 final contract was signed.

Petitioner's claim could not thereafter be divested, by instructions alleged to have been given, by Avis to his agent, to tell petitioner he is not to look to Avis for payment. After the principals met and came to a tentative understanding it was too late for Avis to absolve himself of liability.

Understandably the U.S. Supreme Court is deluged with petitions for certiorari. True this is not a first amendment case, a search and seizure case or such other case which is daily headlined by the media.

It is nevertheless a proper case for consideration by this court.

It is petitioner's contention that Cohon decided subsequent to Minichello vs. Royal Business Funds, does not require written evidence signed by the party to be charged specifically agreeing to pay a finder's fee. If employment is established and the transaction and parties are identified, an agreement to pay on a quantum meruit basis follows. If employment is not established, there then must be an inference of an obligation to pay. That is what Cohon vs. Russel states.

This is a case which presents a serious doubt as to the validity, correctness or adequacy of the precedent established by the Courts below. The case itself is of great precedent potential and of public concern. In the short period of time during the pendency of this appeal two cases were presented for interpretation of the Cohon vs. Russel case and both sustained petitioner's view.

We urge that a Writ of Certiorari issue and since only a legal question is presented, the order be reversed and judgment granted in favor of petitioner.

Respectfully Submitted,

JOSEPH HELLER,
Counsel for Petitioner,

January 16, 1969

Ultra Dynamics Corporation
Two Wall Street
Paterson, New Jersey

Gentlemen:

EXHIBIT APPEARING AT PAGE 31 Appendix, Filed with C.C....

In connection with the agreements between you and Warren E. Avis and you and Avis Industrial Corporation I have acted as ~~broker~~ finder. In full consideration thereof I agree to accept Nine Thousand (9,000) shares of Common Stock, $.10 par value, of Ultra Dynamics Corporation and do hereby release you from any and all further claims thereunder, such payment to me shall be paid upon final consummation of the foregoing transactions

Irving P. Karlin

Agreed and Accepted:
Ultra Dynamics Corporation